PUBLIC PROSECUTOR

v.

NG LAI HUAT & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA THAMBY CHIK JC
[FT CRIMINAL TRIAL NO. CR 56-1-87]
16 MARCH 1990.

CRIMINAL PROCEDURE: *Kidnapping - Section 3(1) of the Kidnapping Act 1961 - Section 34 of the Penal Code - Whether it was proved that the wrongful confinement was carried out with the intention of holding the victims for ransom - Testimony of PW13 - Maker of demands was dead at the time of trial - Whether demands were hearsay - "Ransom" - Section 10 of Evidence Act - Section 114(g) of the Evidence Act 1950 - Amended charges.*

EVIDENCE: *Hearsay - Fundamental principles - Admissibility - Exceptions to general rule - Section 32 of the Evidence Act 1950 - Purpose of the utterances - Law applicable - Prosecution to proof case beyond reasonable doubt.*

The five accused persons in this case were initially charged with an offence that they did, in furtherance of a common intention, with intent to hold for ransom one Dr. Radzi and one En. Abdul Aziz Majid and wrongfully confined them and therefore did commit an offence punishable under s. 3(1) of the Kidnapping Act read with s. 34 of the Penal Code.

The sole question for the determination of the Court was whether it had been proven that the accused did so with the intention of holding the victims for ransom.

The learned DPP urged the Court to accept the said demands conveyed through Datuk Ibrahim, (PW13) the former director-general prisons, by one Jimmy Chua, the purported spokesman for all 5 accused, and this the learned DPP contended constituted ransom as spelt out in the Kidnapping Act 1961.

On the 5th day of the trial, while PW13 was relating his conversation with Jimmy Chua in respect of the demands made by the latter, defence Counsel for the third and fifth accused Mr. Karpal Singh, asked "Is Jimmy Chua alive now". To this PW13 replied "He has been hanged."

Thereupon, Mr. Karpal Singh took objection to the purported demands as alleged by prosecution, made by Jimmy Chua which he urged was hearsay evidence.

The Court was required to make a ruling on this objection.

Held:

[1] The Court reversed its earlier ruling and held that Jimmy Chua's purported demand as being inadmissible for being hearsay.

[2] After discarding the evidence of PW13 in relation to Jimmy Chua's purported demands, the remaining oral evidence adduced at the trial was insufficient to sustain the two charges against the five accused person under s. 3(1) of the Kidnapping Act 1961.

[3] 'Ransom' which is one of the essential ingredients of the offence under s. 3(1) of the Kidnapping Act 1961 was absent.

[4] The prosecution had not proved its case beyond reasonable doubt that the five accused persons had committed an offence under s. 3(1) of the Kidnapping Act 1961.

[5] However the Court was satisfied, on the evidence adduced by the prosecution; that the five accused persons were involved in the abduction and wrongful confinement of Dr. Radzi and En. Aziz Majid. They had therefore committed an offence punishable under s. 365 of the Penal Code read together with s. 34 of the Penal Code.

[6] The charges were duly amended and all the accused persons unequivocally pleaded guilty to each of the charges.

[7] The 1st, 2nd and 3rd accused were sentenced to five years imprisonment on each of the charges from the date of arrest. The sentences to run concurrently. The 4th and 5th accused were sentenced to three years imprisonment from the date of arrest and the sentence was to run concurrently.

Cases referred to:
Subramaniam v. PP [1956] MLJ 220; 1 WLR 965
Teper v. R [1952] 2 All ER 447
Myers v. Director of Public Prosecutions [1964] 2 All ER 881
Ratten v. R [1972] AC 378

Legislation referred to:
Evidence Act 1950, ss. 10, 32, 114illus.(g)
Kidnapping Act 1961, s. 3(1)
Penal Code, ss. 34, 365

For the public prosecutor - Jalaludin bin Saleh, DPP
For the 1st and 4th accused - Lee Swee Seng; M/s. Ch'ng Lee & Co.
For the 2nd accused - Muhammad Shafee Abdullah & P. Vallen; M/s. Shafee & Co.
For the 3rd and 5th accused - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

Faiza Thamby Chik JC:

All the five accused persons are charged with the following two charges:

First Charge

That you, with Chua Chap Seng @ Jimmy Chua, between 9.15 a.m. on 17 October 1986 and 5.40 p.m. on 22 October 1986 at hospital building in Pudu Prison, Jalan Hang Tuah, in the city of Kuala Lumpur, in the Federal Territory, in furtherance of the common intention of you all, with intent to hold for ransom, did wrongfully confine one Dr. Radzi bin Jaafar NRIC No. 0116886 and you have thereby committed an offence punishable under s. 3(1) of the Kidnapping Act (No. 41 of 1961) read with s. 34 of the Penal Code.

Second Charge

That you, with Chua Chap Seng @ Jimmy Chua, between 9.15a.m. on 17 October 1986 and 5.40 p.m. on 22 October 1986 at hospital building in Pudu Prison, Jalan Hang Tuah, in the city of Kuala Lumpur, in the Federal Territory, in furtherance of the common intention of you all, with intent to hold for ransom, did wrongfully confine one Abdul Aziz bin Abdul Majid NRIC No. 4002881 and you have thereby committed an offence punishable under s. 3(1) of the Kidnapping Act (No. 41 of 1961) read with s. 34 of the Penal Code.

In this case, there is no dispute that the victims, Dr. Radzi and Encik Aziz, were wrongfully confined at the hospital building in Pudu Prison, Kuala Lumpur by the five persons mentioned above between the dates and times referred to in the two charges. The sole question for the determination of this Court is whether it has been proved that they did so with the intention of holding them for ransom.

The foundation of the prosecution's case is based mainly on the oral testimony of Datuk Ibrahim bin Hj. Mohd. (PW13), the former director-general of prison, and his evidence as far as it is relevant in respect of "ransom" may be summarised as follows:

(i) On 17 October 1986 he was informed by his office at the Prison Headquarters in Taiping that two persons, one Dr. Radzi and the other Encik Aziz, were held as hostages by six remand prisoners of Pudu Prison in the prison hospital in Pudu Prison, Kuala Lumpur.

(ii) On 18 October 1986 he went to Pudu prison, Kuala Lumpur and at the prison hospital he was introduced to Jimmy Chua, one of the six remand prisoners, by the deputy superintendent. He met Jimmy Chua alone. He said that Jimmy Chua demanded:

(a) to be freed from prison;

(b) to be provided with a get away car so that he could take Dr. Radzi and Encik Aziz together with the five accused persons and get out of Pudu Prison completely;

(c) that the Government withdraw all the charges against him and the five accused persons.

(iii) He also said that Jimmy Chua was making the above demands on behalf of himself as well as on behalf of the five accused persons as they could not understand Malay or English very much.

(iv) He said that he met Jimmy Chua every day in the morning and in the evening until night-time except when Jimmy Chua was having his nap, from 18 October 1986 until Dr. Radzi and Encik Aziz were rescued on 22 October 1986. He further said that on those days starting on 18 October 1986 until 22 October 1986 Jimmy Chua repeatedly made the said demands.

(v) He said that after Jimmy Chua introduced each of the five accused persons to him on 18 October 1986 he did not come close to anyone of the five accused persons anymore except that the five accused persons wished him "selamat pagi" and then went inside.

Now, the learned DPP Encik Jalaludin Saleh urged the Court to accept the said demands conveyed through Datuk Ibrahim by Jimmy Chua were made by all the five accused persons through their spokesman Jimmy Chua; and this, the learned DPP contended constituted ransom as spelt out in the Kidnapping Act 1961.

Now, at this juncture, it may be quite apposite for me to relate this. Now, PW13 began giving his evidence on oath on the fifth day of the trial on 9 March 1990. While he was relating his conversation with Jimmy Chua in respect of the demands made by the latter, the learned defence Counsel Mr. Karpal Singh, Counsel for the 3rd accused and the 5th accused, got up and asked "is Jimmy Chua alive now?" PW13 answered, "he has been hanged." Thereupon, Mr. Karpal Singh took objection to the demands made by Jimmy Chua on PW13 as this piece of evidence, he urged, was hearsay within the general principles expounded by the Privy Council in the case of *Subramaniam v. PP* [1956] MLJ 220. Mr. Karpal Singh further stated that if the purpose of adducing the utterances by Jimmy Chua to Datuk Ibrahim was to establish the truth of what was uttered, he would object. Encik Shafee Abdullah, Counsel for the 2nd accused, and Mr. Lee Swee Seng, Counsel for the 1st accused and the 4th accused, raised the same objection. In the circumstances, I adjourned the case for thirty minutes to allow the defence Counsel to make preparation for a short submission on this point. When the Court met again at 10.30a.m. I heard brief submissions made by the learned defence Counsel Mr. Karpal Singh, Encik Shafee Abdullah and the learned DPP Encik Jalaludin

Saleh; at the end of which, after due consideration of the brief submissions made, I ruled that the utterances in respect of the demands made were admissible as I was of the opinion at that time, that the facts contained in the utterances in respect of the demands made by Jimmy Chua to PW13 in the light of the evidence adduced by the prosecution had been shown to be logically relevant under s. 10 of the Evidence Act 1950.

The prosecution closed their case on the seventh day of the trial on 14 March 1990. And the learned defence Counsel made their submissions on the eighth day of the trial on 15 March 1990. In gist the submissions of Counsel revolved round the meaning of the word 'ransom' as obtainable in the Kidnapping Act 1961, the utterances in respect of the demands made by Jimmy Chua to PW13 as being hearsay evidence, the definition of s. 34 of the Penal Code being an evidential section and s. 10 of the Evidence Act 1950 which deals with the substantive offence of conspiracy and s. 114(g) of the Evidence Act 1950 about the drawing of adverse inference. As will soon become apparent, it will not be necessary for me to touch on the meaning of the word 'ransom' as defined in the Kidnapping Act 1961; and also s. 114(g) of the Evidence Act; nor will it be necessary for me to touch on s. 34 of the Penal Code; and s. 10 of the Evidence Act 1950. Therefore, I shall concentrate the rest of my judgment on what is hearsay evidence.

The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has long been established as a fundamental principle of the law of evidence.

What is hearsay evidence? Evidence by a witness of what another person has stated (whether verbally, in writing or otherwise) on a prior occasion is inadmissible for the purpose of proving that any fact stated by that person on such prior occasion is true. The hearsay rule will be infringed where reliance is placed on the evidence of someone not before the Court where the evidence is adduced in order to prove that the facts as stated are true.

And in *Teper v. R* [1952] 2 All ER 447 Lord Normand said:

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.

In my opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony. Notwithstanding this general rule, certain exceptions have been recognised upon the ground of necessity or convenience. In Malaysia, these exceptions are set out in s. 32 of the Evidence Act 1950. Since neither the learned Counsel for the accused persons nor the learned DPP seemed to rely on any of these statutory provisions, no more need be said about them in this judgment.

The rule against hearsay is described in *Cross on Evidence*, 6th Edn., (1985) p. 453 as one of the oldest, most complex and most confusing of the exclusion rules of evidence. In *Myers v. Director of Public Prosecutions* [1964] 2 All ER 881 at p. 884, Lord Reid said:

> It is difficult to make any general statement about the law of hearsay evidence which is entirely accurate ...
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> It does not seem however that in many cases there was no justification either in principle or logic for carrying the exception just so far and no further. One might hazard to surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle. This kind

> of judicial Legislation, however, became less and less acceptable and well over a century ago the patchwork which then existed seems to have become stereotyped. The natural result has been the growth of more and more fine distinctions, so that it now takes even so concise an author as Professor Cross over one hundred closely packed pages to explain the law of hearsay evidence.

The hearsay rule does not apply where the purpose of adducing the evidence is to show not the truth of what was said but that the statement was in fact made. The relevance of such evidence, called original evidence, is revealed by the leading case of *Subramaniam v. PP* [1956] MLJ 220. In this case, the accused was charged with unlawful possession of ammunition. His defence was that he had been captured by terrorists and was acting under duress. The trial Judge held that the evidence of his conversation with the terrorists was inadmissible unless the terrorists testified. The Privy Council allowed his appeal. The hearsay rule was not infringed because his evidence about what the terrorists had said to him was not adduced in order to show that what the terrorists had said was true but in order to show that threats had in fact been made. The statement of the terrorists comprised threats against Subramaniam's family and the important thing was that Subramaniam believed the terrorists although it may of course have been that the terrorists were not telling the truth when they said they would terrorise Subramaniam's family.

Here, in *Subramaniam's* case, he wanted to prove the words that had been spoken to him in order to establish his reaction to them which would entitle him to the defence of duress. The further questions whether the words are true did not arise; what was in issue was that the words were threats of such a nature as to constitute duress and he believed them. For this purpose, he must be entitled to rely on the terms of the threat as original evidence.

In *Ratten v. R* [1972] AC 378 at 387, Lord Wilberforce said:

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimonially," i.e., as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the board in *Subramaniam v. Public Prosecutor* [1956] 1 WLR 965 at p. 970:
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> > Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

Now, what was the purpose of introducing these utterances in respect of the demands allegedly made by Jimmy Chua to PW13? The learned DPP said that the purpose was to show that ransom was made not only by Jimmy Chua himself but also by the five accused persons. Here, the oral hearsay was that of the re-telling by PW13 of utterances in respect of the demands made by Jimmy Chua. Now, this may or may not be hearsay. It is hearsay and therefore inadmissible if the purpose of the utterances in respect of the demands made by Jimmy Chua was to establish the truth of those utterances in respect of the demands made. It is not hearsay and therefore is admissible when the purpose was to establish by the utterances in respect of the demands made by Jimmy Chua not the truth of what Jimmy Chua uttered but the fact that Jimmy Chua did utter something to PW13.

I have dealt here at length with the basic principle of hearsay evidence because I am of the view that the demands made by Jimmy Chua to PW13 formed the superstructure of the prosecution's case. I was wrong to admit the evidence of PW13 in relation to Jimmy Chua's purported demands in the early part of the prosecution stage. I therefore reverse my earlier ruling on this point and rule that those purported demands are inadmissible for being hearsay.

Now, after discarding the evidence of PW13 in relation of Jimmy Chua's purported demands, the remaining oral evidence adduced at this trial was insufficient to sustain the two charges against the five accused persons under s. 3(1) of the Kidnapping Act 1961. 'Ransom' which is one of the essential ingredients of the offence under s. 3(1) of the Kidnapping Act 1961, is absent here.

I am not satisfied that the prosecution had proved its case beyond reasonable doubt that the five accused persons had committed an offence under s. 3(1) of the Kidnapping Act 1961.

I am, however, satisfied that on the prosecution's evidence all the five accused persons were involved in the abduction and wrongful confinement of one Dr. Radzi and one Encik Aziz Majid. They had therefore committed an offence under s. 365 of the Penal Code. I proceeded to amend the two charges to s. 365 of the Penal Code against the five accused persons as follows:

First Amended Charge

> That you, jointly between 9.15 a.m. on 17 October 1986 and 5.40 p.m. on 22 October 1986 at hospital building in Pudu Prison, Jalan Hang Tuah, in the city of Kuala Lumpur, in the Federal Territory ,in furtherance of the common intention of you all, did abduct one Dr. Radzi b. Jaafar NRIC No. 0116886 with intent to cause that person to be wrongfully confined and that you have thereby committed an offence punishable under s. 365 of the Penal Code read together with s. 34 of the Penal Code.

Second Amended Charge

> That you, jointly between 9.15a.m. on 17 October 1986 and 5.40 p.m. on 22 October 1986 at hospital building in Pudu Prison, Jalan Hang Tuah, in the city of Kuala Lumpur, in the Federal Territory, in furtherance of the common intention of you all, did abduct one Abdul Aziz bin Abdul Majid NRIC No. 4002881 with intent to cause that person to be wrongfully confined and that you have thereby committed an offence punishable under s. 365 of the Penal Code read together with s. 34 of the Penal Code."

The two amended charges were read to each of the accused persons. Each of the accused persons unequivocally pleaded guilty to the two amended charges in the presence and hearing of their Counsel, and understood the nature and consequences of their pleas.

After hearing mitigating factors submitted by all the five accused persons through their Counsel, I sentenced the 1st accused, the 2nd accused and the 3rd accused on each of the charges to five years' imprisonment from the date of arrest to run concurrently. I sentenced the 4th accused and the 5th accused on each of the charges to three years' imprisonment from the date of arrest to run concurrently.

Also found at [1990] 1 CLJ 1190